STATE OF MICHIGAN

COURT OF APPEALS

CAROL SIORAKES, Plaintiff-Appellant,	UNPUBLISHED April 26, 2011
v	No. 295034 Macomb Circuit Court
TARGET CORPORATION, Defendant-Appellee.	LC No. 2008-004121-NO

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Plaintiff Carol Siorakes fell near an area of uneven sidewalk on the premises of a store owned by defendant Target Corporation. The circuit court granted Target summary disposition, finding that Siorakes "failed to demonstrate that the alleged hazard proximately caused her accident." We reverse and remand, and decide this case without oral argument in conformity with MCR 7.214(E).

At Siorakes's deposition, she described that as she approached the Target store, "I stubbed my toe on something. It was something I tripped over and I fell real fast." While Siorakes sat on the ground awaiting transport to a hospital, a bystander pointed out that she may have fallen on an area of uneven cement. Siorakes identified the location of the uneven cement as "right where I fell," and asserted that "there was nothing else there that I could have fallen over. I felt my toe catch it."

After the accident, Siorakes's husband visited the scene, measured the discontinuity between a slightly raised concrete piece and the adjoining slabs of cement, and photographed the sidewalk. He testified that an area between two slabs of cement appeared to have been previously patched with cement, creating a "sloped" area of repair. The height differential of the slope and the nearby slab of sidewalk measured from one-half to seven-eighths of an inch. Photographs of the pavement submitted to the circuit court reveal a small area of broken and repaired sidewalk.

Target moved for summary disposition pursuant to MCR 2.116(C)(10), contending that (1) the minimal height difference between the slabs did not create an unreasonably dangerous condition, (2) the condition was open and obvious, and (3) Siorakes's attribution of her fall as caused by the uneven concrete constituted speculation and conjecture. The circuit court's written opinion and order granting summary disposition addressed only Target's third argument,

concluding that Siorakes's failure to observe what she tripped over before the fall relegated the proximate cause of her injuries to "impermissible speculation and conjecture."

Siorakes challenges the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

Siorakes first disputes the circuit court's view that she "failed to demonstrate that the alleged hazard proximately caused her accident." In reaching this conclusion, the circuit court highlighted Siorakes's deposition testimony that immediately after the fall, she asked herself, "Why did I trip?" and "What did I trip over?" The circuit court opined that this testimony evidenced the speculative nature of Siorakes's causation proofs. Causation in a negligence action requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Cause in fact "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Proximate cause demands an examination of "the foreseeability of consequences, and whether a defendant should be held legally responsible for [those] consequences." *Id*. at 163. Although a plaintiff may establish causation circumstantially, "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 163-164. When a motion for summary disposition challenges causation pursuant to MCR 2.116(C)(10), "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*. at 161.

Viewed in the light most favorable to Siorakes, sufficient evidence establishes a question of fact whether the uneven concrete constituted a proximate cause of her injuries. Siorakes testified that while she sat on the ground after her fall, a bystander pointed out an uneven area of the sidewalk and hypothesized that it might have caused Siorakes's accident. Siorakes described the area as "right where I fell," and further averred, "I felt my toe catch it." This evidence amply supports a reasonable jury's finding that Siorakes's injuries resulted naturally, probably, and directly from the uneven pavement, which Target created when it repaired the sidewalk outside its premises. Consequently, the circuit court improperly granted summary disposition on this ground.

Target alternatively contends that the circuit court should have granted summary disposition on the basis of the open and obvious nature of the sidewalk defect. In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), our Supreme Court

defined open and obvious hazards as dangers "known to the invitee" or "so obvious that the invitee might reasonably be expected to discover them." When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id*. at 475. Our Supreme Court has explicitly cautioned that when applying this test, "it is important for courts ... to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). Thus, the proper question is not whether Siorakes could or should have observed the uneven pavement, but whether the repaired area was observable to the average observer on casual inspection. *Price v Kroger Co of Michigan, Inc*, 284 Mich App 496, 501; 773 NW2d 739 (2009).

In support of its position that the sidewalk defect appears open and obvious, Target relies on photographs submitted to the circuit court, depicting from various angles and directions the uneven pavement. The defect is difficult to discern in the photographs, in part because of its small size, and in part because its color and contours blend with the surrounding sidewalk.[1] We conclude that reasonable minds viewing the photographs could differ with respect to whether the area of sidewalk discontinuity qualified as open and obvious to a reasonable invitee on casual inspection. See M Civ JI 19.03. Accordingly, the open and obvious danger doctrine does not afford a basis for summary disposition of Siorakes's premises liability claim.

We lastly reject Target's contention that the uneven sidewalk does not amount to an unreasonably dangerous condition because the height differential between the repaired area and the remainder of the sidewalk measures less than an inch. The parties agree that the raised pavement on which Siorakes tripped represents an area of sidewalk repair. Target's prior repair of the sidewalk gives rise to a rational inference that Target viewed the underlying and uneven sidewalk as a trip hazard and a potential danger to customers entering and exiting the store. Construed in the light most favorable to Siorakes, whether Target's repair of the uneven pavement created a new trip hazard in the form of an uneven, sloped patch of the same color as the surrounding cement presents an issue for a jury. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995), our Supreme Court held that "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become

[1] We respectfully disagree with the dissent's inherently contradictory position that the sidewalk defect was too "minor" to be dangerous, yet qualified as open and obvious because Siorakes's husband successfully located the defect while searching for it. *Post* at 2-3. The small size of the sidewalk discrepancy supports that a question of fact exists regarding whether it appeared obvious to an average observer on casual inspection. The husband's discovery of the defect while specifically looking for it on the pavement hardly equates to "casual inspection" of the premises. *Price*, 284 Mich App at 501.

questions for the jury to decide." Because reasonable minds could differ regarding the risk presented by the unevenly repaired sidewalk, a jury must decide this issue.[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

[2] The dissent correctly observes, "The condition here is easily avoided by picking up one's feet more than half an inch." *Post* at 3. Whether Siorakes should have been walking with an alternate gait presents an issue of comparative negligence. It remains for a jury to first determine whether the condition was open and obvious and whether Target breached its standard of care by failing to correct it.